Sprint

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Via Electronic Mail Delivery

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Re: ***Written Ex Parte Communication***
CTIA Wireless LNP Implementation Declaratory Ruling Petitions,
CC Docket No. 95-116
Sprint Declaratory Ruling Petition Regarding Traffic Routing and Rating,
CC Docket No. 01-92

Gentlemen:

This letter addresses certain concerns that have been raised regarding the authority of the FCC to grant the relief sought in the above dockets given the current state of the record. Specifically, the question has arisen whether sufficient notice has been provided under the Administrative Procedure Act, 5 U.S.C. § 553(b) ("APA"). As discussed below, the relief sought in both the CTIA Petitions and the Sprint Petition is an affirmation and clarification of existing rules and the resolution of a controversy under existing law – not a rule change. Indeed, denial of the Petitions would more likely result in a modification of existing law. Accordingly, the notice provided in both cases is wholly sufficient under APA requirements and the relief sought should be granted.

This letter is confined to the legal issue of notice and compliance with the APA. However, Sprint continues to encourage the Commission to grant the pending Petitions on legal and policy grounds, as more fully set forth in the various comments and *ex parte* filings already made in these dockets.

Background

On January 23, 2003, CTIA filed a petition for declaratory ruling regarding the obligations of ILECs under the existing local number portability ("LNP") rules when porting from and to wireless carriers.[1] The Wireless and Wireline Bureaus issued a *Public Notice,* and this *Public Notice* was thereafter published in the Federal Register,[2] even though the APA does not require such publication for declaratory ruling petitions.[3] On May 13, 2003, CTIA filed a further petition for declaratory ruling raising several additional issues and once again a *Public Notice* was issued and published in the Federal Register.[4] Comments and reply comments have been submitted as well as numerous *ex parte* filings, and all issues have been briefed before the Commission.

On May 9, 2002, Sprint filed a petition for declaratory ruling regarding ILEC routing and rating of mobile-to-land traffic. The Wireless and Wireline Bureaus issued a *Public Notice*,[5] and this *Public Notice* was published in the Federal Register.[6] Extensive comments, reply comments and *ex parte* filings have also been made in this docket, and ILECs acknowledge that this petition "is certainly ripe for Commission decision and the Commission should decide it."[7]

The question has now been asked whether the recent appellate court decision, *Sprint* v. *FCC,* 315 F.3d 369 (D.C. Cir. 2003), precludes the FCC from rendering declaratory rulings on these petitions and requires the FCC to issue a new notice of proposed rulemaking ("NPRM") before granting the relief CTIA and Sprint seek. Sprint demonstrates in Part IV below that this court decision actually supports action on the Sprint rating/routing petition as well as the major-

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1 *See Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association,* In the Matter of Telephone Number Portability, CC Docket 95-116 (Jan. 23, 2003).

2 *See FCC,* Telephone Number Portability, CC Docket 95-116, 68 Fed. Reg. 7323 (Feb. 13, 2003).

3 *See, e.g., Sanyo Manufacturing Corp.,* 3 FCC Rcd 1864 ¶ 6 (1988), *citing Chisholm v. FCC,* 538 F.2d 349, 365 (D.C. Cir.), cert. *denied,* 429 U.S. 890 (1976). Although the FCC was not required to publish its public notice in the Federal Register, this publication satisfied that APA content requirements for rulemaking proceedings, because the Public Notice contained "a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

4 *See Petition for Declaratory ruling of the Cellular Telecommunications &Internet Association,* In the Matter of Telephone Number Portability, CC Docket No. 95-116 (May 13, 2003), *summarized in* 68 Fed. Reg. 3457 (June 10, 2003).

5 *See Public Notice,* Comment Sought on Sprint Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs, CC Docket No. 01-92, DA 02-1740 (July 18, 2002).

6 *See* FCC, Routing and Rating of Traffic by Incumbent Local Exchange Carriers (ILECs), CC Docket No. 01-92, 67 Fed. Reg. 51581 (Aug. 8, 2002).

7 Verizon Opposition, CC Docket No. 95-116, at 11 (June 13, 2003). *See also* BellSouth Comments, CC Docket No. 95-116, at 11 (June 13, 2003)("BellSouth agrees that this [Sprint] issue must be resolved."); CTIA Declaratory Ruling Petition, CC Docket No. 95-116, at 24 (May 13, 2003)("The Commission should promptly resolve the intercarrier dispute between BellSouth and Sprint.").

ity of issues raised in the CTIA petition.[8] Moreover, and by contrast, a ruling purporting to relieve ILECs from their obligations under Sections 251(a), 251(b)(2) and 251(b)(5) would be in direct violation of the Communications Act and the FCC's implementing regulations.

It is important to emphasize from the outset that courts have long held that agencies possess broad discretion in deciding whether to proceed *via* a rulemaking or declaratory ruling.[9] This is true "regardless of whether the decision may affect agency policy and have general prospective application."[10]

Sprint demonstrates below that not only is a rulemaking unnecessary to grant these petitions, but also that the FCC would be required to complete a *new* rulemaking before it could deny the relief Sprint and CTIA seek, because the petitions ask only that the FCC enforce existing statutory and regulatory law.

I. The Administrative Procedures Act Authorizes the FCC to Grant a Declaratory Ruling to Terminate a Controversy

The APA expressly authorizes agencies like the FCC to "issue a declaratory order to terminate a controversy or remove uncertainty," with Congress further specifying that declaratory order have "like effect as in the case of other orders."[11] The FCC's own rules further recognize that the FCC may issue a declaratory ruling terminating a controversy or removing uncertainty."[12] In this regard, courts have expressly held that "an interpretation of . . . regulations by . . . declaratory ruling . . . [is] well within the scope of the familiar power of an agency to interpret the regulations within the framework of an adjudicatory proceeding."[13] Declaratory ruling proceedings, like proceedings involving an "interpretative rule,"[14] are exempt from the APA's no-

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8 CTIA raises several issues in its two petitions and Sprint does not attempt to discuss each of them here. However, with respect to the issues most critical to implementation of LNP -- the rate center issue, interconnection obligations and the alleged requirement of direct connection -- CTIA seeks only the enforcement of existing obligations and not a change of an existing rule.

9 *See, e.g., NLRB v. Bell Aerospace*, 416 U.S. 267, 291-95 (1974); *SEC* v. *Chenery*, 332 U.S. 194, 203 (1947); *RTC Transportation* v. *ICC,* 731 F.2d 1502, 1505 (11th Cir. 1984); *Viacom International* v. *FCC,* 672 F.2d 1034, 1042 (D.C. Cir. 1982); *New York State Comm'n* v. *FCC,* 669 F.2d 58, 62 (2d Cir. 1982); *25 Large Oceangoing Cargo Ships,* 5 FCC Rcd 594, 595 ¶ 13 (1990).

10 *New York State Comm'n* v. *FCC,* 749 F.2d 804, 815 (D.C. Cir. 1984), *quoting Chisholm* v. *FCC,* 538 F.2d 349, 365 (D.C. Cir.), *cert. denied,* 429 U.S. 890 (1976).

11 5 U.S.C. § 554(e).

12 47 C.F.R. § 1.2.

13 *British Caledonian Airways* v. *CAB,* 584 F.2d 982, 993 (D.C. Cir. 1978), *quoting Trans International Airlines* v. *CAB,* 432 F.2d 697, 612 n.9 (D.C. Cir. 1970).

14 *See* 5 U.S.C. § 553(b)(3)(A).

tice and comment rulemaking requirements.[15] Thus, it was not necessary for the Bureaus to publish notice of either CTIA or Sprint's petitions in the Federal Register.

The numerous comments submitted in response to these petitions confirm that there is a major controversy between wireless carriers and incumbent LECs (and rural ILECs in particular) over whether ILECs may, under existing law, refuse to honor the rating and routing points designated by wireless carriers for their telephone numbers (NXX codes or thousands blocks) and whether such carriers must satisfy their statutory porting obligations. As Sprint's recent *ex parte* filing regarding the CTIA petition demonstrates, carriers across the country are currently denying their obligation to implement number portability with wireless carriers.[16] Likewise, the controversy which prompted Sprint's original rating and routing petition, the ability to establish local numbers within the Northeast Telephone Company's exchange area, remains unresolved.

Congress designed the declaratory ruling procedure precisely to "terminate a controversy or remove uncertainty."[17] As courts have noted, the "only result [of commencing a new rulemaking now] would be delay while the Commission accomplished the same objective under a different label. Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments."[18] Action is needed to ensure that consumer choice, and FCC expectations regarding LNP are met in November.

II. A New Rulemaking Is Not Required Because Sprint and CTIA Seek Confirmation of Existing Law; In Fact, the FCC May Not Deny these Petitions without Completing a New Rulemaking

It is axiomatic that an NPRM published in the Federal Register is necessary before an agency may change existing rules that were adopted in an APA rulemaking proceeding. *See* Part IV *infra.* Here, however, both the CTIA and Sprint's petitions ask the FCC only to confirm *existing* legal requirements. With respect to the CTIA Petitions:

- The Communications Act imposes an affirmative obligation on all local exchange carriers ("LECs") "to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission."[19]
- The Commission has adopted rules establishing the requirements for number portability, and nothing contained in these rules permits LECs to refuse porting

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15 *See, e.g., Sanyo Manufacturing Corp.,* 3 FCC Rcd 1864 ¶ 6 (1988), *citing Chisholm* v. *FCC,* 538 F.2d 349, 365 (D.C. Cir.), *cert. denied,* 429 U.S. 890 (1976).

16 Sprint Corporation *Ex Parte* Letter, CC Docket No. 95-116 (Aug. 8, 2003).

17 5 U.S.C. § 554(e).

18 *Chisholm* v. *FCC,* 538 F.2d 349, 364-65 (D.C. Cir.), *cert. denied,* 429 U.S. 890 (1976).

19 47 U.S.C. §251(b)(2).

based upon the existence of numbers in a rate center or the existence of an interconnection agreement.[20]

The CTIA Petitions merely seek the nondiscriminatory application of existing rules and industry guidelines. CTIA does not seek modification of existing rules regarding rate centers, interconnection agreements or points of presence. To the contrary, CTIA seeks enforcement of existing law. Indeed, if the Commission were to find that wireless carriers must first establish numbering resources in each rate center from which it receives a port, or establish an interconnection agreement addressing compensation issues, the Commission would in effect be establishing new requirements and obligations on wireless carriers before they could seek portability. Such a finding would not only amount to rule change but would be in direct violation of the Act and the FCC's implementing rules and orders.

With respect to Sprint's Petition:

- FCC rules specify that a LEC "must provide the type of interconnection reasonably requested by a mobile services licensee or carrier,"[21] and the FCC long ago held that LECs must provide Type 2 interconnection upon request.[22] With Type 2 interconnection, a wireless carrier's routing point is located at the LATA tandem switch, while its rating points are located at various local calling areas within the LATA.[23] The FCC has thus already recognized that wireless carriers can have different rating and routing points – the very point Sprint asks the FCC to reaffirm in its declaratory ruling petition.
- The Communications Act permits a wireless carrier to interconnect indirectly with other carriers.[24] The FCC has, moreover, interpreted the Act to mean that wireless and other competitive carriers need establish only "one POI per LATA"[25] – meaning that there may be only one routing point in the LATA. The FCC has also recognized that carriers "typically need numbering resources in multiple rate cen-

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20 *See* 47 C.F.R. §¶ 52.2 *et seq.*

21 47 C.F.R. § 20.11(a). *See also Bowles v. United Telephone,* 12 FCC Rcd 9840, 9849 ¶ 15 (1997) ("LEC is obligated to provide a CMRS provider with the interconnection of its choice upon its request."); *Third Radio Common Carrier Order,* 4 FCC Rcd 2369, 2376 ¶ 41 (1989).

22 *See* FCC Policy Statement on Interconnection of Cellular Systems, 59 R.R.2d 1275 ¶ 2 (1986), *aff'd* 2 FCC Rcd 2910 (1987) and 4 FCC Rcd 2369 (1989).

23 *See Notes on the Network,* TR-NPL-000275, Section 16, at 16-2, § 2.03 (1986)("Through [Type 2 interconnection], the [wireless carrier] can establish intra-LATA connections to BOC end offices connected to the tandem *and to other carriers interconnected through the tandem.*")(emphasis added).

24 *See* 47 U.S.C. § 251(a)(1).

25 *Unified Intercarrier Compensation Regime,* 16 FCC Rcd 9610, 9634 ¶ 72 (2001). *See also Virginia Arbitration Order,* 17 FCC Rcd 27039 at ¶ 52 (2002).

ters to establish to establish a footprint in a particular geographic area,"[26] – meaning that carriers will have multiple rating points in a LATA. Thus, FCC has again recognized that wireless carriers may have a routing point that is different from their rating points – the very point Sprint asks the FCC to reaffirm in its declaratory ruling petition.

- FCC rules require the administration of telephone numbers pursuant to industry guidelines.[27] Industry guidelines acknowledge that carriers provide the routing and rating points for their telephone numbers and that the routing and rating points may be different[28] – the very point Sprint asks the FCC to reaffirm in its declaratory ruling petition.

To deny Sprint's petition, the FCC would have to hold that wireless carriers must always have the same routing and rating points for their telephone numbers – a holding that would necessarily require the Commission to amend its existing rules and long-standing interpretation of both the Act and its rules. Sprint submits that the FCC cannot deny the Sprint petition without first completing a new rulemaking that changes its existing rules.

III. With Respect to the Sprint Petition, the FCC Also Has an Option to Enter a Discrete Order in Its Pending Docket 01-92 Rulemaking Proceeding

The Wireless and Wireline Bureaus have noted that the "Sprint Petition and BellSouth's Opposition raise interconnection and intercarrier compensation issues under consideration in CC Docket No. 01, *Developing a Unified Intercarrier Compensation Regime,* 66 FR 28410, May 23, 2001)."[29] The Bureaus have therefore directed parties to "file their pleadings in CC Docket No. 01-92," stating that the Sprint "petition and other pleadings will be incorporated into CC Docket No. 01-92."[30]

The Docket 01-92 rulemaking is a massive proceeding, touching virtually all aspects of intercarrier interconnection and compensation. The APA does not require agencies to complete rulemakings in a single order addressing all the issues raised in the NPRM. To the contrary, the FCC possesses the flexibility to address different issues in different orders, even though the issues may have all been raised in a single NPRM. In this regard, courts have noted "the broad discretion with which Congress has invested the Commission to adopt whatever procedures will

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26 *Second NRO Order,* 16 FCC Rcd 306, 366 ¶ 114 (2002). *See also First NRO Order,* 15 FCC Rcd 7574, 7577 n.2 (2000)("A carrier must obtain a central office code for each rate center in which its provides service in a given area code.").

27 *See* 47 C.F.R. § 52.15(d).

28 *See* Industry Numbering Committee, Central Office Code Assignment Guidelines at §§ 6.2.1, 6.2.2.

29 *See Public Notice,* Routing and Rating of Traffic by Incumbent Local Exchange Carriers (ILECs), CC Docket No. 01-92, 67 Fed. Reg. at 51582 (Aug. 8, 2002).

30 *Id.*

best conduce to the proper dispatch of business and to the ends of justice."[31] Thus, rather than issue the declaratory order that Sprint has requested, the FCC could alternatively grant the requested relief by entering a report and order in its CC Docket No. 01-92 rulemaking proceeding.[32]

This being said, however, action should not be further delayed pending resolution of all the issues raised in the *Intercarrier Compensation* docket. The Sprint Petition has been fully briefed and is ripe for resolution now, as many ILECs and other commenters acknowledge.[33].

IV. Sprint v. FCC, 315 F.3d 369 (D.C. Cir. 2003) Confirms That the FCC Need Not Commence a New Rulemaking Before Acting on the CTIA or Sprint Rating/Routing Petitions

The recent court decision involving payphone compensation, *Sprint* v. *FCC,* 315 F.3d 369 (D.C. Cir. 2003), confirms that the FCC need not commence a new rulemaking before acting on the CTIA or Sprint declaratory ruling petitions.

In its *First Payphone Reconsideration Order,*[34] the FCC ruled that that the "facilities-based" interexchange carrier ("IXC") should compensate the payphone owner for toll calls originated on the payphone. In the *Second Payphone Reconsideration Order,*[35] the FCC "modif[ied] our rules to require the first" IXC to compensate the payphone owner.

The FCC did not adopt its *Second Payphone Reconsideration Order* in response to a reconsideration petition, nor did the FCC issue a new NPRM. Instead, it adopted its *Second Payphone Reconsideration Order* in response to a clarification petition filed by a coalition of payphone owners. This petition complained that payphone owners were not being adequately compensated under the arrangements adopted in the *First Payphone Reconsideration Order,* and it urged that the FCC require the IXC identified by the Carrier Identification Code ("CIC") to compensate the payphone owner. The FCC requested comment on the coalition petition, but it did not publish this public notice in the Federal Register and the revised rules eventually adopted in the *Second Payphone Reconsideration Order* were different than what the coalition petition had requested (with the FCC specifically rejecting the CIC solution that had been proposed). In

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31 *National Association of Broadcasters* v. *FCC,* 740 F.2d 1190, 1221 (D.C. Cir. 1984)(supporting citations omitted).

32 Because Sprint's petition seeks reaffirmation and enforcement of existing law, it may be more appropriate to enter a declaratory order rather than a report and order in Docket No. 01-92, because it would appear that the FCC can achieve its objective for this rulemaking – develop a unified intercarrier compensation regime – only by having a vision of how all intercarrier interconnection should be accomplished.

33 *See* note 7 *supra.*

34 *First Payphone Reconsideration Order,* 11 FCC Rcd 10893 (1996), *aff'd in part, rev'd in part on other grounds, Illinois Public Telecommunications Ass'n* v. *FCC,* 117 F.3d 555 (D.C. Cir. 1997).

35 *Second Payphone Reconsideration Order,* 16 FCC Rcd 8098 ¶ 1 (2001).

Sprint v. *FCC,* the D.C. Circuit held that the FCC had "failed to provide adequate notice and opportunity to comment" and thus contravened the requirements of the APA.[36] In other words, the Court held only that the FCC may not change a rule adopted in a rulemaking proceeding without commencing a new rulemaking proceeding that complies with APA requirements.

Importantly, the D.C. Circuit reaffirmed in *Sprint* that the FCC may continue to issue declaratory rulings to clarify or enforce existing law. The Court stated:

> Underlying these general principles is a distinction between rulemaking and clarification of an existing rule. Whereas a clarification may be embodied in an interpretative rule that is exempt from notice and comment requirements, new rules that work substantive changes in prior regulations are subject to the APA's procedures. Thus, the court described as "a maxim of administrative law" the proposition that, "if a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative."[37]

To illustrate this distinction, the Court specifically noted that in 1998 the Bureau had properly interpreted and clarified the FCC's *First Payphone Reconsideration Order*, even though the Bureau did not issue a NPRM and did not publish its Public Notice in the Federal Register.[38]

Sprint in its declaratory ruling petition does not ask the FCC to repudiate or change any existing FCC requirement. As noted above, Sprint seeks only to confirm and enforce existing law. Similarly, CTIA's petitions regarding the application of rate center porting requirements, interconnection obligations and points of presence do not advocate a change of existing law, but only an affirmation of existing law. Although the FCC here has complied fully with the APA requirements for rulemaking proceedings in the Sprint petition (by publishing notice of the petition in the Federal Register and by seeking comment on the petition as part of a broader pending rulemaking), the fact remains that the FCC could have granted the Sprint petition even without following these procedures.

Conversely, as also demonstrated above, because it is the opponents of the CTIA and Sprint petitions that seek to change existing law, the Commission cannot deny these petitions without a new rulemaking proceeding that changes existing law. Indeed, denial of these Petitions may be in direct violation of the statutory obligations imposed on LECs under the Act.

The FCC has long used its declaratory ruling authority to clarify existing law regarding the interconnection obligations of LECs.[39] Sprint submits that in this instance, existing law re-

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36 *Sprint* v. *FCC,* 315 F.3d 369, 371 (D.C. Cir. 2003).

37 *Id.* at 374 (internal citations omitted).

38 *See id.* at 372 and 374.

39 *See, e.g.,* FCC Policy Statement on Interconnection of Cellular Systems, 59 R.R.2d 1275 ¶ 2 (1986), *aff'd* 2 FCC Rcd 2910 (1987) and 4 FCC Rcd 2369 (1989). Indeed, courts have held that state preemption decisions involving interconnection issues are "appropriate for disposition by declaratory ruling." *North Carolina Utilities Comm'n* v. *FCC,* 537 F.2d 787, 791 n.2 (4th Cir), *cert. denied,* 429 U.S.

garding ILEC interconnection obligations to wireless carriers is not ambiguous. Nevertheless, some ILECs have decided unilaterally that they will no longer comply with this law, and entry of the requested declaratory ruling is thus necessary "to terminate a controversy or remove uncertainty."[40] To confirm, the successful deployment of LNP is at issue.

Pursuant to Section 1.1206 of the Commission's *ex parte* rules, this letter is being electronically filed with the Secretary's office. Please associate this letter with the file in the above referenced matters.

Respectfully submitted,

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1027 (1976). If the FCC can lawfully utilize declaratory rulings for persons not subject to its regulatory authority, it certainly can use this procedure for telecommunications carriers subject to its jurisdiction.

40 5 U.S.C. § 554(e). *See also* 47 C.F.R. § 1.2.